Date Issued: April 23, 1998

Case No: 97-STA-18

In the Matter of

DEBORAH GREENHORN,

Complainant,

v.

ARROW STAGE LINES,

Respondent.

APPEARANCES:

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8th and Minnesota
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For the complainant

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For the respondent

BEFORE: DONALD W. MOSSER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provision of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (the Act), and the regulations promulgated thereunder, 29 C.F.R. Part 1978.

Complainant, Deborah Greenhorn, filed a timely complaint with the Secretary of Labor on January 2, 1997, alleging that Arrow Stage Lines discriminated against her in violation of the whistleblower provisions of the Act. The Secretary, acting through her duly authorized agents in the Occupational Safety and Health Administration, investigated the complaint and determined that there was no reasonable cause to believe the respondent had violated the whistleblower provisions. (ALJX 1).[1]

Ms. Greenhorn contested the Secretary's findings in a letter dated April 8, 1997, and appealed her determination. (ALJX 1). She waived the procedural time constraints under the Act on May 9, 1997. (ALJX 2). Accordingly, I conducted a formal hearing at Kansas City, Missouri, on September 4, 1997, at which time the parties were given the opportunity to present both testimony and documentary evidence. The record remained open until December 28, 1997, for the filing of simultaneous and reply briefs. Both parties' reply briefs were received more than thirty days after the deadline for the simultaneous briefs, but I have considered them nevertheless. The additional documentary evidence complainant attempted to submit with her reply brief, however, was not considered, as it was not offered during the hearing.

The findings of fact and conclusions of law which follow are based upon the evidence presented and arguments of counsel.

ISSUE

Whether Arrow Stage Lines discharged Deborah Greenhorn as a result of safety complaints protected by the Act.

FINDINGS OF FACT

Arrow Stage Lines (Arrow) operates commercial vehicles designed to transport more than ten people in interstate commerce. The company maintains its principal office in Omaha, Nebraska, as well as several other offices in various cities in the Midwest, including Kansas City, Missouri. Arrow has two types of drivers: full-time or regular drivers, who, as their name implies, work for Arrow full-time and are eligible for company benefits, and casual drivers, who work on

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[1] References to ALJX, CX, and RX refer to exhibits of the administrative law judge, complainant, and respondent, respectively. The transcript of the hearing is cited as "Tr." followed by the page number. Citations to administrative decisions are citations to the official copies of the decisions found in the Office of Administrative Law Judges on-line law library, which is accessible through the Internet at http://www.oalj.dol.gov/library.htm.

an as-needed basis, are paid by the hour or by the mile, and who are not eligible for benefits. The casual drivers may work the equivalent of full-time hours on any given day or week, although they are not guaranteed to work any hours. (CX 1 at A-3; RX 2 at 44). Arrow does not hire regular drivers, but only casual drivers. When a full-time driver is added, Arrow promotes a casual driver to full-time status. *Id.*

Respondent hired Ms. Greenhorn as a casual driver of its buses on September 13, 1996. (ALJX 9). She was hired as a casual driver. Like many of Arrow's casual drivers, she also worked another job, in this case driving school buses for Laidlaw Transit (Laidlaw). (Tr. 18, 124). At the time she was hired, Arrow had an unclear policy regarding accidents. (Handbook, Section F, CX 1). Although failure to report an accident could result in termination, the policy did not mention the consequences of having an accident, other than ineligibility for or reduction of various driver bonuses and awards. (Handbook, Sections E & F, CX 1). The parties stipulated that new employees are considered to be in an introductory status for a period up to 180 days. (ALJX 9).

Ms. Greenhorn, like all new drivers, was sent to a four to five day orientation and training session in Omaha before she began driving for Arrow. This program consisted of an introduction to the company, a review of the regulations governing commercial buses, and viewing safe driving videos. The training did not contain actual lessons on how to drive a bus, as all Arrow drivers were required to be experienced, licensed bus drivers. (Tr. 120; CX 1). During the training, Arrow's director of training and safety instructed Ms. Greenhorn that she was to log the hours she drove for Laidlaw as well as her driving hours with Arrow, so that she would not drive over the number of hours allowed by the federal Department of Transportation. (Tr. 20, 123). Ms. Greenhorn did log these hours on a "statement of on-duty hours" for the week of her training. (Tr. 20; RX 2 at 46). She also logged her Laidlaw hours on a driver data sheet for the week after her training, but did not log them thereafter. (RX 5 at 12; Tr. 20). Ms. Greenhorn's supervisor at Arrow must have been aware that her driver data sheets were incomplete because it was his responsibility to review these logs and he obviously was aware of her continuing work at Laidlaw. (Tr. 80, 124, 137, 150-152, 157, 163, 168). He indeed would call the Laidlaw offices when he needed to contact Ms. Greenhorn to work for Arrow. (Tr. 21). Her additional work for Laidlaw obviously was the basis of her complaints to Arrow that she was working more than she had intended and needed time off. (Tr. 26-30, 90-91, 131, 163).

On October 7, 1996, Ms. Greenhorn was driving a bus for Arrow and misjudged a turn, running into a column and causing $5,700.00 in damage. (ALJX 9; RX 7). It had been raining that day, and the windshield of the bus she was driving had leaked, dripping water onto the brake and accelerator pedals. (Tr. 44, 50). She reported the accident to the Southern Division manager at Arrow, as her supervisor was out of town. (Tr. 30, 148, 172; RX 7). During her conversations with the manager, she mentioned the leaking windshield and expressed concern about the safety of operating a bus with a leaking windshield. (Tr. 44, 48, 50, 172-73, 185). She also mentioned these concerns to the safety director and her supervisor. (Tr. 53-54, 129, 154). Although the bus was checked for a leaking windshield, the record does not show the outcome of

these tests. (Tr. 179). Arrow investigated the accident, eventually deciding that Ms. Greenhorn could have prevented the accident. (RX 1). This determination was not made known to Ms. Greenhorn until her termination later in that year. (Tr. 32, 161).

Ms. Greenhorn and the other Arrow drivers received a new accident policy with their pay checks on October 15, 1996. (Tr. 105). This policy, which purported to have an effective date of October 1, 1996, provided that termination was an option after the third accident, but then provides that "any accident, depending upon severity and negligence could be grounds for immediate termination." (RX 3). It also provided that an accident occurring during the probationary period would result in the probationary period being extended for an additional six months from the date of the accident, but also could result in termination. *Id.*

At various times during her short tenure with Arrow, Ms. Greenhorn also complained about the number of hours that she worked. (Tr. 26, 28-9, 31, 91, 110, 130, 163). She told the safety director and her supervisor that she was working more hours than she expected, and expressed concern that she was becoming fatigued. (Tr. 28-29, 31, 91, 130, 163). She did not explicitly state that she was driving in excess of the number of hours permitted by the Department of Transportation regulations, and in fact, did not know if she was or was not until she spoke with a representative of that department on December 30, 1996. (Tr. 92).

On December 7, 1996, Ms. Greenhorn had another accident while driving for Arrow. Her bus skidded into a parked car that was parked closer than she realized. (RX 6). This resulted in about $500 worth of damage. (ALJX 9). After this accident, in discussions with Ms. Greenhorn, both the safety director and her supervisor mentioned that she could be terminated as a result of the accidents. (Tr. 131, 149; CX 3). However, neither told her she would be, nor did they indicate if termination was likely. Arrow suspended Ms. Greenhorn after the second accident, pending the results of an investigation of the accident and making a decision about her employment. (Tr. 149-50). On December 29, 1996, Ms. Greenhorn prepared a letter to the safety director, in which she inquired about the status of the accident investigation and referred to the possibility that she might be terminated. (CX 3). This letter was mailed to the safety director on the following day. (Tr. 54; RX 2 at 4).

Monday, December 30, 1996, was a busy day for all parties in this litigation. Ms. Greenhorn began the day by calling the Occupational Safety and Health Administration (OSHA) about an uncovered oil pit in the floor of Arrow's maintenance area. (Tr. 57). She called OSHA back at 8:40 a.m. to formally complain about the pit. *Id.* She also mentioned possible over hours violations, and the leaking windshield incident. She was instructed to call the Department of Transportation, which she did at 9:00 a.m. (Tr. 57-58). I reiterate that she also mailed a copy of her letter to Arrow's safety director via certified mail that afternoon. That afternoon, OSHA contacted Arrow to report a complaint had been filed against them, and faxed a copy of the complaint to the company at 1:45 p.m.. (Tr. 152; CX 2). The supervisor, who received the OSHA complaint in Kansas City, informed the safety director in Omaha. (Tr. 130). OSHA did not state who had filed the complaint, nor did Ms. Greenhorn's name appear on the complaint.

(Tr. 152-53; CX 2). At 3:00 p.m., the safety director — who was also the personnel director for the company — faxed a one-page, nine-sentence letter to the respondent's supervisor recommending Ms. Greenhorn's termination. (CX 3; Tr. 95, 176). The stated reasons for the termination were Ms. Greenhorn's two accidents within the probationary period. (CX 3). At the time Arrow terminated Ms. Greenhorn, Arrow's management employees were aware that they could not terminate her for filing an OSHA complaint. (Tr. 166). Ms. Greenhorn was informed of her termination by her supervisor the following morning. (Tr. 60).

Ms. Greenhorn then timely brought this action, as well as filing a complaint with the Equal Employment Opportunity Commission for sex discrimination. (RX 9). She also filed a complaint with the Department of Transportation, which conducted an investigation and found violations of federal safety regulations. (CX 6).

CONCLUSIONS OF LAW

The Surface Transportation Assistance Act prohibits discharging an employee because

> (A) the employee . . . has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, . . . or
> (B) the employee refuses to operate a vehicle because—
>> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
>> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a). These activities, which are referred to as protected activities, are the only activities for which redress is available under the Act. Different wrongful activities by an employer may be redressed under different statutes, but those statutes are not at issue in this proceeding.

Generally, in order for a claim under the Act to proceed, a complainant must first make out a *prima facie* case showing that the employer and employee are covered under the Act, that the employee engaged in a protected activity under the Act, and that the employee was terminated or otherwise discriminated against as a result of this protected activity. *Mace v. Ona Delivery Systems, Inc.*, 91-STA-10 @ 3 (Sec'y Jan. 27, 1992). Normally, the respondent then has the opportunity to rebut the *prima facie* case by showing it had a non-discriminatory reason for disciplining the complainant. *Green v. Creech Brothers Trucking*, 92-STA-4 @ 7 (Sec'y Dec. 9, 1992) *remanded on other grounds* (Sec'y Dec. 7, 1993). However, where the employer asserts a non-discriminatory reason for discharge during its case, the *prima facie* step can be skipped, and I can proceed directly to the next step: deciding whether the employer's reason is pretextual.

Olson v. Missoula Ready Mix, 95-STA-21 (Sec'y Mar. 15, 1996); *Pittman v. Goggin Truck Line, Inc.*, 96-STA-25 @ n.2 (ARB Sept. 23, 1997) (citing *Carroll v. Bechtel Power Corp.*, 91-ERA-46 (Sec'y Feb. 15, 1995), *aff'd sub nom, Carroll v. U.S. Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1996)).

I initially find that there is no dispute that the respondent is covered by the Act. In this case, Arrow does not, and cannot, challenge that it is covered by the Act. *See* 49 U.S.C. § 31101; Respondent's Brief at 1. Nor do I find that there is a question of whether Ms. Greenhorn engaged in protected activity. I do find, however, that the parties are confused about what qualifies as protected activity under the Act. Some activities Ms. Greenhorn assumes are protected are not, while some activities Arrow presumes are not, are protected.

Ms. Greenhorn's complaints to Arrow management about the leaking windshield qualify as protected activity. Contrary to Arrow's assumption, complaints do not have to be made to an outside agency in order to be protected. Internal safety complaints also qualify. *Pittman v. Goggin Truck Line, Inc.*, 96-STA-25 @ 2 (ARB Sept. 23, 1997); *Davis v. H.R. Hill, Inc.*, 86-STA-18 @ (Sec'y Mar. 19, 1987). Ms. Greenhorn's complaint is similar to that found in *Pittman*, where the complainant, a truck driver, after driving the truck, complained to a member of management that steering problems made the truck unsafe. *Id.* Ms. Greenhorn complained to a member of Arrow management that the leaky windshield made driving her bus unsafe. As in *Pittman*, this qualifies as protected activity.

The comments Ms. Greenhorn made to management about working more hours than expected and needing time off also qualify as protected activity. Federal regulations prohibit operating or requiring or permitting a driver to operate a commercial vehicle "while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." 49 C.F.R. § 392.3. Had Ms. Greenhorn refused to operate her bus because of her fatigue, she would have clearly been engaged in protected activity. *Self v. Carolina Freight Carriers Corp.*, 91-STA-25 @ 3 (Sec'y Aug. 6, 1992). As noted, the Act also recognizes complaints relating to safety regulations to be protected activity under the Act. 49 U.S.C. § 31105(a)(1)(A). It is uncontested that Ms. Greenhorn and Arrow supervisors discussed that she was working more hours than expected. As excessive driving or driving while fatigued are violations of the regulations, I find these complaints are related to safety regulations, and thus are protected activity.

The same cannot be said for her failure to log both her time at Arrow and Laidlaw. While this clearly contravenes the pertinent regulations, [49 C.F.R. § 395.8(a)], I do not find that she complained about this apart from her complaints about driving too much. Therefore, neither her failure to follow the regulations, nor her supervisor's failure to correct her misbehavior, qualifies as protected activity.

The main thrust of Ms. Greenhorn's argument, however, revolves around her complaint to OSHA regarding the uncovered oil pit in the floor. While the evidence is conflicting as to whether Arrow's management had knowledge of the OSHA complaint before it was decided to terminate Ms. Greenhorn, the very timing of events in this case tends to support her theory that she was discharged as the result of filing this complaint. Unfortunately for the complainant, however, the filing of this OSHA complaint does not qualify as protected activity under the Act. Her complaint did not arise under a motor vehicle safety regulation, as required by the Act. Her counsel points to no such regulation, nor could I find one. Rather, this case resembles *Foley v. J. C. Maxxwell,* 95-STA-11 (Sec'y July 3, 1995), where the Secretary of Labor found the subject of the complaint — asphalt fumes at a customer's location — concerned a potentially serious OSHA violation, but one that did not fall under the jurisdiction of the Act.[2] *Id.* @ 2. While the OSHA statute also contains whistleblower protections, that statute requires the Secretary of Labor to bring the complaint, and vests jurisdiction of such cases in the hands of the federal district courts, not the Office of Administrative Law Judges. 29 U.S.C. § 660(c); *Foley,* 95-STA-11 @ n.2. Thus, I have no authority to address any question of retaliation resulting from the OSHA complaint. For the same reasons, even if I found internal complaints had been made about the oil pit and about a drain in the maintenance area — two areas of dispute in the testimony — they would also fall outside the scope of the Act. For this reason, I leave resolution of these factual disputes to a more appropriate forum.

In summary, the protected activity at issue in this case involves the internal complaints about the leaky windshield and Ms. Greenhorn's excessive hours. Arrow maintains that it discharged her not as the result of these complaints, but because she had two accidents during her probationary period. All Arrow must do is articulate a non-discriminatory reason for her termination; it need not prove this was the reason. *Shute v. Silver Eagle Co.,* 96-STA-19 @ 2 (ARB June 11, 1997). It is Ms. Greenhorn's burden to show that this reason was pretextual.

Ms. Greenhorn's complaints about the leaky windshield occurred in October of 1996, around and after the time of her first accident. Yet no action was taken against her at that time. Her complaints about being tired also took place in October and December, yet all parties agreed that Arrow continued to give her driving assignments. No disciplinary action was taken against her until after her second accident — at which time she was suspended — and after her complaint to OSHA, which is not activity protected under the STAA. *Cf. Green v. Creech Brothers Trucking,* 92-STA-4 @ 4 (Sec'y Dec. 9, 1992) (complainant's two accidents occurred two years before termination, and therefore were not legitimate factors in disciplinary action). The evidence shows that the factors which precipitated her termination were the two accidents. The suspension

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[2] Unlike the situation in cases like *Gay v. Burlington Motor Carriers,* 92-STA-5 (Sec'y May 20, 1992), where the Secretary found dangers in the maintenance shop could spill over into dangers on the highway, here no spillover is likely. In *Gay,* the complaint involved inadequate ventilation, leading to exposure to paint fumes and exhaust, which the court noted could impair both the mechanics who checked and repaired the vehicles, and the drivers who had to drive the vehicles. *Id.* @ 2. In the present case, no such insidious disability is at issue, as the presence of the open pit is unlikely to impair drivers and mechanics unless they fell in, in which case they presumably would be sent to receive medical attention, not drive a bus.

was imposed soon after the accident, and the possibility of termination was mentioned at that time. Furthermore, the sequence of events on December 30, 1996 shows that if any complaint precipitated her discharge, it was the formal complaint she filed with OSHA that morning, not the internal complaints she had made weeks or months earlier. *See Pittman v. Goggin Truck Line, Inc.*, 96-STA-25 @ 3 (ARB Sept. 23, 1997) (complainant's internal complaints, not attitude problems respondent claimed, precipitated discharge). As far as the Act is concerned, there were legitimate, non-discriminatory reasons for her discharge. Therefore, I find that Ms. Greenhorn has not proven that she was discharged for engaging in protected activity, and therefore is not entitled to the whistleblower protections of the Act. Her claim must therefore be denied.

ORDER

For the above stated reasons, IT IS HEREBY ORDERED that the complaint of Deborah Greenhorn under the Surface Transportation Assistance Act is DISMISSED.

DONALD W. MOSSER
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U. S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N. W., Washington, D. C. 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).